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**UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO**

POCATELLO DENTAL GROUP, P.C.,  
an Idaho professional corporation,

Plaintiff,

vs.

INTERDENT SERVICE CORPORATION,  
a Washington corporation,

Defendant.

Case No. CIV 03-450-E-BLW

INTERDENT SERVICE CORPORATION,  
a Washington corporation,

Counterclaimant,

vs.

POCATELLO DENTAL GROUP, P.C., an  
Idaho professional corporation; DWIGHT G.  
ROMRIELL, individually; LARRY R.  
MISNER, JR., individually; PORTER  
SUTTON, individually; ERNEST SUTTON,  
individually; GREGORY ROMRIELL,  
individually; ERROL ORMOND, individually;  
and ARNOLD GOODLIFFE, individually;

Counterdefendants.

**PLAINTIFF'S REPLY IN  
SUPPORT OF ITS MOTION  
FOR SANCTIONS  
PURSUANT TO F.R.C.P.  
RULE 37(b)(2)**

205

COMES NOW the Plaintiff ("Group") and makes this Reply in support of its Motion pursuant to F.R.C.P. Rule 37(b)(2). InterDent Service Corporation ("ISC") contends that it "...has responded in full" to the Court's August 16, 2004 Order. As will be shown below, it has not properly or completely responded to the discovery requests served upon ISC on March 31, 2004.

Group makes the following representations and arguments in support of its Motions for Sanctions:

1. It should be remembered that ISC did not serve its amended discovery response until *after* Group filed its motion for sanctions. Although ISC's amended response is dated October 1, 2004, it was mailed to Group's counsel with an October 4, 2004, letter from ISC's counsel.<sup>1</sup> ISC would have received its copy of Group's motion for sanctions on October 4, 2004, the same day ISC's counsel mailed its unverified amended response to Group's counsel. ISC's amended response had been prepared prior to October 4, 2004, but was being withheld from Group.

2. Group has signed every form of Protective Order offered by ISC or offered by the "Romriell" group represented by Lowell N. Hawkes. It did so before and after the Court entered its August 16, 2004 Order compelling ISC to answer its discovery requests. Any delay in having the protective order entered was caused by ISC's failure to resolve the Romriell group's objections to ISC's form of protective order or accept the Romriell group's form of protective order.

3. ISC agreed to provide answers to Interrogatories 2, 6, 12, and 15, and Requests for Production 2, 8, 11, 14, 17, 18, and 31 upon the entry of a Protective Order. *See*, Court's August 16, 2003 Order, page 13 (Docket No. 167). Any delay occasioned by the late entry of the Protective

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<sup>1</sup>See, Exhibit "2" to Kaplan's Affidavit in Opposition to PDG's Motion for Sanctions.

Order only applies to these specific discovery requests. The remaining requests could have and should have been answered shortly after the August 16, 2004 order, not 51 days later.

4. ISC was ordered by the Court to answer Interrogatory Nos. 1, 3, 4, 10, 11, 16, 19, 20, 21, 22, respond to Requests for Production Nos. 1, 5, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 25, 31; and admit or deny Requests for Admission Nos. 6, 8, 9, and 10 without regard to the entry of a Protective Order. *See*, Court's August 16, 2003 Order, page 17 (Docket No. 167). ISC did not respond with its amended response to these enumerated discovery requests until October 4, 2004, (received by Counsel for Group on October 6, 2004) some 51 days later.

5. ISC's amended answers to Interrogatory Nos. 3, 4, 6, 8, 12, 13, 15, 16, 17, 18, 19, and 22 state that ISC, in lieu of providing an actual answer, relies upon F.R.C.P. 33(d) and that it would, generally, "produce or make available responsive documents." Such a response is inadequate and an abuse of F.R.C.P. 33(d). F.R.C.P. 33(d) required ISC to "specify the records from which the answer may be derived..." and further stated that: "A specification shall be in sufficient detail to permit the interrogating party to locate and identify, as readily as can the parties served, the records from which the answer may be ascertained."

A party relying upon F.R.C.P. 33(d) to answer an interrogatory must not only specify the record, it must provide a copy of the specified document with the answer to the interrogatory. In *Mai Systems Corporation v Walbert*, 1997 U.S. App. LEXIS 13897, the 9<sup>th</sup> Circuit held that:

*"Federal Rule of Civil Procedure 33(d) allows a party to answer an interrogatory by specifying and providing business records when the answer may be derived or ascertained from the business records and the burden of doing so is substantially the same for the party serving the interrogatory and the party served."*

In *Mai Systems*, the party responding to the interrogatory not only referred to F.R.C.P. 33(d) in its answer, it actually specified the documents (which had already been provided) or provided the documents with its answers to the interrogatories. The 9<sup>th</sup> Circuit Court found that procedure to be acceptable under Rule 33(d). ISC has neither specified the documents nor provided the specified document with its answer to the interrogatories.

A United States District Court for the Central District of California, in *Safeco Insurance Company of America v. Rawstrom*, 183 F.R.D. 668, 1998 U.S. Dist. LEXIS 22108 (1998) held that:

“Where the answer to an interrogatory can be discerned from a document, see Fed.R.Civ.P. 33(d), *the document should be attached as an exhibit to the responses*, or if that is impractical, the document and relevant portions of it should be clearly and specifically identified. General references to documents or the contents of files is unacceptable.”(emphasis added)

In 1996 a United States District Court for the Central District of California, in *The Walt Disney Company v. Sean Paul DeFabiis*, 183 F.R.D. 281, 1996 U.S. Dist. LEXIS 16925 (1996) held that:

“The answers to Interrogatory Nos. 9 and 10 are not in sufficient detail to comply with Rule 33(d). ‘The[] response[s] did not specify where in the records the answers could be found....Rule 33(d) was amended in 1980 to prevent abuse of the business records option. The amendment was ‘to make it clear that a responding party has the duty to specify, by category and location, the records from which answers to Interrogatories can be derived.’”

ISC has neither specified the documents in question nor provided the documents (or the portions of such documents) from which the answers to these interrogatories could be derived. For the foregoing reasons ISC’s amended response, following this Court order compelling it to answer to these interrogatories, is inadequate and justifies the imposition of sanctions.

6. Group’s discovery requests provided definitions and instructions to ISC as it related to ISC’s identification of “persons”. A “person” was defined as any natural person, company,

corporation, association, partnership, proprietorship, cooperative, or any other kind of business or legal entity, and its agents or employees." To "identify" a person, ISC was asked to state the person's name, business address, residential address, telephone number, and their current employment. It has failed to do so.

In its amended answer to Interrogatory No. 1, ISC names Mike Fiori and Ted Van Eerden and states that they are not ISC employees. ISC did not provide any further information which would allow Group to locate and contact these people, such as their address, phone number or current employment.. ISC's amended response to Interrogatory No. 1 is incomplete.

In its amended answer to Interrogatory No. 2, ISC names Bruce Call and Barbara Henderson and "the individual dentists who requested or approved such discontinuance of treatment at the Pocatello Office." *This is the same exact answer ISC gave in its initial response dated May 16, 2004!* Group asked the Court to compel ISC to 'identify' the "individual dentists who requested or approved such discontinuance of treatment at the Pocatello Office." ISC has not done so. ISC's amended response to Interrogatory No. 2 is not only incomplete, *it is not any different than its original response!* ISC, therefore, has not responded at all to this Court's order compelling it to answer Interrogatory No. 2. Sanctions are appropriate.

In its amended answer to Interrogatory Nos. 8 and 13, ISC restated the objections it made in its initial responses dated May 16, 2004. Any objections by ISC were overruled by the Court when on August 16, 2004, it ordered ISC to answer Interrogatory Nos. 8 and 13. To the extent ISC insists on restating the old, or asserting any new objection to these interrogatories, its answers fail to comply with the Court's August 16, 2004 order.

7. ISC's amended answers to Requests for Production Nos. 1, 2, 5, 10, 11, 12, 13, 14, 15, 16, 17, 18, 22, 23, 25, and 31 generally states that "ISC will produce or make available responsive documents *to the extent such documents exist.*" ISC did not (1) identify or specify the documents responsive to these Requests, (2) state where the specified documents were located, (3) when the specified documents would be made available for inspection and copying, or (4) *whether or not the requested documents even exist.* ISC has been given ample time (since May 16, 2004) to determine if documents responsive to these requests for production exist. If they don't exist, ISC should have said so. It should not be coy and state that they will be produced "to the extent such document exists." *Does ISC expect Group to travel who-knows-where only to find out that none of the requested documents exist?* If ISC does not know if the documents exist, has it performed its good faith obligation to locate such documents and produce them for Group's inspection? If these records exist, has ISC "assembled" responsive documents or are they mixed in with hundreds or thousands of non-responsive documents unrelated to this case?

8. ISC's amended response to Request for Production No. 19 attempts to limit its production to tax returns relating to ISC's business in Idaho. ISC's initial objection to this Request for Production did not attempt to limit its production to "tax returns relating to ISC's business in Idaho." Nor did its response to Group's motion to compel. The Court's order compelling ISC to respond to Request for Production No. 19 is not limited to the production of "tax returns relating to ISC's business in Idaho." ISC's unilateral decision to so limit its response is inappropriate and in violation of the Court's August 16, 2004 Order.

9. ISC's amended response to Request for Production No. 23 raises, for the first time, a claim of privilege. Such a claim was not raised in its initial response. Nor did ISC's response to

Group's motion to compel raise a claim of privilege. ISC has not identified the specific documents or provided any type of privilege log, as required by the instructions contained in Group's initial discovery requests, in order to substantiate the privilege claim or allow Group to evaluate the appropriateness of such a claim. ISC's belated claim of privilege, without any information identifying the allegedly privileged documents and the legal basis for claiming the privilege, suggests that ISC's objection is insincere.

10. ISC was ordered to respond to Group's Requests for Admission Nos. 6, 8, 9, and 10. ISC's response to Request for Admission No. 6 is non-responsive. This request asked ISC to admit or deny that it refused Group's request for equipment, supplies, staff or other support without presenting the request to the Joint Operating Committee. ISC's answer was "ISC denies that it has failed to present matters to the JOC if such matters are within the JOC's jurisdiction." This response incorporates a condition, i.e., the extent of the JOC's jurisdiction, which is not contained within the Group's Request for Admission. ISC's amended answer is not responsive.

Request for Admission No. 8 asks ISC to admit that it has not distributed to Group or its dentists any revenues collected as "interest". ISC's amended response restates its position that any interest charged by ISC is not "revenues" of the Group. ISC has again ignored the parties' contract. The word "revenues" is defined by Article 2.4 of the parties' Management Agreement. "Revenues" shall mean all of the Group's accounts receivable (net of contractual adjustments and bad debt), and cash collections. Revenues shall include all funds collected by, or legally due to the Group or any Affiliate of the Group, including, without limitation the following: (a) all fee-for-service payments for services to the Group Patients or Beneficiaries; (b) all payments established under Payor Contracts; (c) all coordination of benefits or deductibles and third-party liability recoveries related

to the Group's services; (d) all payments, dues, fees or other compensation to the Group; (e) any income, profits, dividends, distributions or other payments from the Group's investments; *and (f) any interest or other non-operating income of the Group.*" See, Exhibit "A" to Affidavit of Chhina, Docket No. 15. ISC should simply admit that it did not distribute to Group any portion of its interest revenues rather than arguing its interpretation of the contract. This was the thrust of Group's motion to compel and ISC has not properly responded to this Request as required by the Court's August 16, 2004 Order.

Request for Admission No. 10 asks ISC to admit that it has paid, from Group's revenues, attorney fees and costs incurred by lawyers hired by ISC to represent the Group. ISC conditions its answer by saying that such attorney fees and costs have not been paid from "revenues to which Group is entitled." That was not the subject of the Request. As shown above, revenues is a defined term. ISC should simply admit that it did pay lawyers it hired to represent Group from the Group's revenues, as that term is defined in the Management Agreement, rather than arguing its interpretation of the contract. This was the thrust of Group's motion to compel and ISC has not properly responded to this Request, as required by the Court's August 16, 2004 Order.

11. ISC has terminated the parties Management Agreement. Article 6.2(c) of the Parties Management Agreement provides that the following shall occur upon the Agreement's termination:

(c) Effect of Termination. Upon termination of this Agreement:

(1) \*\*\*

(2) **Manager shall deliver to Group all records related to the business of and provision of dental care through the Practice, including, without limitation, patient records and any corporate, personnel and financial records maintained for the Practice and Providers, provided, that except as limited by law, including, but not limited to laws governing the confidentiality of patient records, Manager shall have the option to copy (or**



*otherwise duplicate) at its sole cost and expense such records of Group and to retain and utilize such records for its own use.*

Most, if not all of the records requested by PDG in its discovery response are **\*\*\*\* records related to the business of and provision of dental care through the Practice, including, without limitation, patient records and any corporate, personnel and financial records maintained for the Practice and Providers\*\*\*\***. ISC should be required to produce the records requested by Group in its Discovery Requests by honoring Article 2.6(2) of the parties' agreement. Group should not be forced to incur the expense of traveling to ISC's California or Washington locations to inspect an copy recoreds ISC is now required to "deliver" to Group. The Court is asked to compel ISC to honor its obligations under Article 2.6(2) of the parties' agreement. After all, ISC chose to terminate the agreement and place Article 2.6(2) into play.

WHEREFORE, having established good grounds therefore, the Court is asked to grant its Motion for Sanctions and: (1) strike the counterclaim of the Defendant InterDent Service Corporation; (2) strike the defenses raised by InterDent Service Corporation to the Plaintiff's Complaint; (3) deny InterDent Service Corporation any further right to conduct discovery in this case; (4) and award Pocatello Dental Group its attorney fees and costs associated with this motion and its prior motion seeking to compel InterDent Service Corporation to answer the Plaintiff's discovery.

Dated this 3<sup>rd</sup> day of November, 2004.

**COOPER & LARSEN, CHTD**

Attorneys for Plaintiff

By: 

Ron Kerl

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 3<sup>rd</sup> day of November, 2004, I served a true and correct copy

of the foregoing document as follows:

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